Credit Guarantee Corp Malaysia Bhd v Supermaniam a/l Selitan

HIGH COURT (JOHOR BAHRU) — BANKRUPTCY NO JA-29NCC-1973–10 OF 2019
EVROL MARIETTE PETERS JC
17 FEBRUARY 2021

Bankruptcy — Notice — Setting aside — Application to set aside bankruptcy notice by respondent allowed — Appellant appealed against decision in allowing setting aside of bankruptcy notice — Whether respondent was liable for full amount — Whether respondent was bound by letter of guarantee

This was an appeal by the appellant, the judgment creditor against the decision of the senior assistant registrar in allowing the respondent, the judgment debtor's application to set aside the bankruptcy notice. The judgment in default ('the judgment') was recorded against the respondent on 6 November 2017 for RM156,782.53 as at 29 February 2016. The respondent was the guarantor for a loan given to the borrower, one Tat Hock Industrial Sdn Bhd. The letter of guarantee was signed on 29 October 2001. Based on the judgment, bankruptcy proceedings were initiated against the judgment debtor. A bankruptcy notice was filed on 17 October 2019 and on 2 December 2019, the appellant obtained leave of court to proceed against the respondent as the guarantor in the bankruptcy proceedings. An application to set aside the bankruptcy notice was applied and it was allowed. The issues were: (a) whether the respondent was liable for the full amount; and (b) whether the respondent was bound by the letter of guarantee as the respondent submitted that he was not aware that he had signed a letter of guarantee. For the first issue, the respondent contended that since there were five guarantors altogether, the judgment sum was inaccurate as it should have been divided equally amongst the guarantors, rendering the bankruptcy notice wrong in law as decided in *Sumathy a/p Subramaniam v Subramaniam a/l Gunasegaran and another appeal* [2017] 6 MLJ 753 ('*Sumathy*'s case').

Held, allowing appeal:

(1) The court was unable to agree with the respondent's contention in view of the fact that there were differences between the facts of the case with those of *Sumathy*'s case. Although the judgment was obtained against all five guarantors, bankruptcy proceedings were initiated against the guarantors at different times and the appeal involved only one judgment debtor who had applied to set aside the bankruptcy notice. Hence, the principle in *Sumathy*'s case was not applicable. Although the judgment

did not indicate if the defendants were liable jointly and severally, it was crucial to bear in mind that the judgment was predicated on the letter of guarantee. As such, the issue that had to be addressed was what terms and conditions were encapsulated in the letter of guarantee (see paras 8, 10 & 12).

(2) If the respondent's grievance was against the judgment that was ordered against him, the proper redress would have been to apply to set aside the judgment and not to resist the bankruptcy proceedings, in light of the fact that the proceedings were properly taken out against the respondent. It was not open to the judge in exercising his jurisdiction in bankruptcy proceedings to strike out the creditor's petition by disputing the validity of orders made in earlier execution proceedings when the orders had not been set aside particularly so when the respondent had not any time taken steps to have it set aside. Since the judgment was never set aside and neither was there evidence of fraud, illegality or coercion, the argument that the respondent was unaware of what he had signed was untenable (see para 18 & 20).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu, pemiutang penghakiman terhadap keputusan penolong kanan pendaftar yang membenarkan responden, permohonan penghutang penghakiman untuk mengetepikan notis kebankrapan. Penghakiman yang ingkar ('penghakiman') direkodkan terhadap responden pada 6 November 2017 dengan harga RM156,782.53 pada 29 Februari 2016. Responden adalah penjamin untuk pinjaman yang diberikan kepada peminjam, Tat Hock Industrial Sdn Bhd. Surat jaminan ditandatangani pada 29 Oktober 2001. Berdasarkan penghakiman tersebut, proses kebankrapan dimulakan terhadap penghutang penghakiman. Notis kebankrapan difailkan pada 17 Oktober 2019 dan pada 2 Disember 2019, perayu mendapat kebenaran mahkamah untuk memulakan proses terhadap responden sebagai penjamin dalam proses bankrupsi. Permohonan untuk mengetepikan notis kebankrapan telah digunakan dan telah dibenarkan. Isu-isu adalah: (a) sama ada responden bertanggungjawab untuk jumlah penuh; dan (b) sama ada responden terikat dengan surat jaminan kerana responden mengemukakan bahawa dia tidak sedar bahawa dia telah menandatangani surat jaminan tersebut. Untuk isu pertama, responden berpendapat bahawa kerana ada lima penjamin sama sekali, jumlah penghakiman itu tidak tepat kerana seharusnya dibahagi sama antara penjamin-penjamin, menjadikan notis kebankrapan adalah salah dalam undang-undang seperti yang diputuskan dalam *Sumathy a/p Subramaniam v Subramaniam a/l Gunasegaran and another appeal* [2017] 6 MLJ 753 ('kes *Sumathy*').

Diputuskan, membenarkan rayuan:

(1) Mahkamah tidak dapat bersetuju dengan pendapat responden

berdasarkan fakta bahawa terdapat percanggahan antara fakta kes dengan fakta kes *Sumathy*. Walaupun penghakiman itu dibuat terhadap semua lima penjamin, prosiding kebankrapan dimulakan terhadap penjamin pada waktu yang berlainan dan rayuan tersebut hanya melibatkan satu penghutang penghakiman yang telah mengajukan permohonan untuk mengetepikan notis kebankrapan. Oleh itu, prinsip dalam kes *Sumathy* tidak boleh diguna pakai. Walaupun keputusan itu tidak menunjukkan jika pihak defendan bertanggungjawab secara bersama dan berasingan, sangat penting untuk diingatkan bahawa penghakiman itu didasarkan pada surat jaminan. Oleh itu, isu yang harus ditangani adalah terma dan syarat yang termaktub dalam surat jaminan tersebut (lihat perenggan 8, 10 & 12).

(2) Jika ketidakpuasan hati responden adalah berkenaan dengan penghakiman yang diperintahkan terhadapnya, tindakan yang tepat yang harus digunakan adalah untuk mengetepikan penghakiman dan bukanlah menolak proses kebangkrapan, berikutan fakta bahawa proses tersebut telah dilakukan dengan betul terhadap responden. Hakim tidak boleh dalam menjalankan bidang kuasanya dalam proses kebangkrapan untuk membatalkan petisyen pemiutang dengan mempertikaikan kesahihan perintah yang dibuat dalam proses pelaksanaan sebelumnya ketika perintah tidak diketepikan terutama ketika responden tidak pernah mengambil langkah untuk mengetepikannya. Oleh kerana penghakiman itu tidak pernah diketepikan dan tidak ada bukti penipuan, penyalahgunaan undang-undang atau paksaan, hujah bahawa responden tidak mengetahui apa yang telah ditandatanganinya tidak dapat dikendalikan (lihat perenggan 18 & 20).]

Cases referred to

Abu Bakar Ismail, In Re; ex parte Alliance Investment Bank Berhad [2011] 1 LNS 1688, HC (folld)

Alliance Bank Malaysia Bhd (formerly known as Multi Purpose Bank Bhd and Malaysia French Bank Bhd) v Mukhriz bin Mahathir & Anor [2006] 4 MLJ 451; [2006] 2 CLJ 723, HC (folld)

Dato' Dr Elamaran M Sabapathy, Re; ex parte RHB Bank Bhd [2010] MLJU 1424; [2011] 10 CLJ 262, HC (refd)

Malayan Banking Bhd v Datuk Lim Kheng Khim [1992] 2 MLJ 540; [1992] 2 CLJ Rep 826, HC (refd)

Michael C Solle v United Malayan Banking Corporation [1986] 1 MLJ 45; [1984] 1 CLJ Rep 267, FC (refd)

OCBC Bank (Malaysia) Bhd v Lim Hock Kok & Anor (kedua-dua berniaga sebagai rakan kongsi di dalam firma 'Ictinus Home and Building Constructions and Designs') [2017] MLJU 798; [2017] 9 CLJ 454, CA (refd)

Sovereign General Insurance Sdn Bhd v Koh Tian Bee [1988] 1 MLJ 304; [1988] 1 CLJ Rep 277, SC (refd)

A *Sumathy a/p Subramaniam v Subramaniam a/l Gunasegaran and another appeal* [2017] 6 MLJ 753; [2018] 2 CLJ 305, CA (distd)
Tioh Ngee Heng, Re; ex p Yap Kiu Lian @ Norhashimah Yap (Administratrix of the estate of Mohamad Shariff bin Haji Hussain) [2000] 6 MLJ 155; [2000] 1 LNS 197, HC (refd)
B *Yeo Ah Wang v United Malayan Banking Corporation Bhd* [1995] 1 AMR 38 (refd)

Idayu bt Mohd Yusof (A Rahim & Co) for the appellant.
Raman Velu (Raman Velu) for the respondent.

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Evrol Mariette Peters JC:

INTRODUCTION

D **[1]** This is an appeal ('this appeal') by the judgment creditor against the decision of the senor assistant registrar ('SAR') in allowing the judgment debtor's application to set aside the bankruptcy notice.

THE BACKGROUND FACTS

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[2] Judgment in default ('the judgment') was recorded against the judgment debtor on 6 November 2017 for MYR156,782.54 as at 29 February 2016. The judgment debtor in this case was the guarantor for a loan given to the borrower, one Tat Hock Industrial Sdn Bhd. The letter of guarantee was
F signed on 29 October 2001.

[3] Based on the judgment, bankruptcy proceedings were initiated against the judgment debtor. A bankruptcy notice was filed on 17 October 2019, and on 2 December 2019, the judgment creditor obtained leave of court to proceed
G against the judgment debtor as the guarantor in these bankruptcy proceedings.

[4] On 28 January 2020, an application was filed by the judgment debtor to set aside the bankruptcy notice. This was allowed by the SAR on 17 August 2020. Hence, this appeal by the judgment creditor.

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[5] This appeal was allowed for the following reasons.

CONTENTIONS, EVALUATION, AND FINDINGS

I *Whether the judgment debtor was liable for the full amount*

[6] The gist of this appeal hinged on the issue of whether the judgment creditor was entitled to claim the full judgment sum stipulated in the bankruptcy notice.

[7] The judgment debtor contended that since there were five guarantors altogether, the judgment sum was inaccurate as it should have been divided equally amongst the guarantors, rendering the bankruptcy notice wrong in law. In doing so, the judgment debtor relied on several cases including *Re Dato' Dr Elamaran M Sabapathy; ex parte RHB Bank Bhd* [2010] MLJU 1424; [2011] 10 CLJ 262, *Yeo Ah Wang v United Malayan Banking Corporation Bhd* [1995] 1 AMR 38, and the Court of Appeal case of *Sumathy a/p Subramaniam v Subramaniam a/l Gunasegaran and another appeal* [2017] 6 MLJ 753; [2018] 2 CLJ 305.

[8] I was unable to agree with the judgment debtor's contention in view of the fact that there are differences between the facts of the present case and those of *Sumathy a/p Subramaniam v Subramaniam a/l Gunasegaran and another appeal* [2017] 6 MLJ 753; [2018] 2 CLJ 305, in which it was stated by Mary Lim JCA (as she then was):

> Where the judgment is silent or has not specified that liability is joint and several, the liability is necessarily joint. Where liability is joint, each of the judgment debtor shares the liability equally.

[9] It is pertinent to note that in *Sumathy a/p Subramaniam v Subramaniam a/l Gunasegaran and another appeal*, the respondent there had, on the same date, filed two separate bankruptcy notices against both appellants and in each bankruptcy notice, the same judgment sum together with interest and costs, were specified as the unpaid debt. As a result thereof, both appellants had, also on the same date, filed separate applications to set aside the bankruptcy notices, on the same ground. This was explained in the following passage:

> *On 16 November 2015, the respondent filed two separate bankruptcy notices against both appellants. In each bankruptcy notice, the same judgment sum* of RM291,800 together with the sum of RM14,504.85 as interest at the rate of 5%pa and the sum of RM4,000 as costs, *was specified as the unpaid debt*. The total sum being RM310,304.85.
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> *On 26 January 2016, both appellants filed separate applications to set aside the bankruptcy notices; the ground relied on however, was the same*; that the sum specified therein was more than what the respondent was legally entitled to under the terms of the summary judgment. The appellants argued that given that the terms of the summary judgment did not specify that the appellants, as judgment debtors were 'jointly and severally liable', the judgment debtors must then be equally liable for the judgment sum. In other words, each judgment debtor should only be liable for half of the judgment sum. (Emphasis added.)

[10] In this case, although judgment was obtained against all five guarantors, bankruptcy proceedings were initiated against the guarantors (including the judgment creditor) at different times; and this appeal involved only one judgment debtor who had applied to set aside the bankruptcy notice. Hence,

the principle in *Sumathy a/p Subramaniam v Subramaniam a/l Gunasegaran and another appeal*, was not applicable to the facts of the present case.

[11] Secondly, and more importantly, the debt in *Sumathy a/p Subramaniam v Subramaniam a/l Gunasegaran and another appeal*, arose from a friendly loan arrangement which did not stipulate if the guarantors were liable jointly and severally. In this case, the judgment reads as follows:

> TIADA KEHADIRAN telah dimasukkan oleh Defendan-Defendan dalam tindakan ini. ADALAH PADA HARI INI DIHAKIMI bahawa Defendan-Defendan hendaklah membayar kepada Plaintif seperti berikut:
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> (a) Keseluruhan jumlah wang terhutang sebanyak RM156,782.54 dikira setakat 29.2.2016;
>
> (b) Faedah pada kadar 6.85% setahum berdasarkan kiraan bulanan dari 1.3.2016 sehingga tarikh penyelesaian penuh;
>
> (c) Kos tindakan ini sebanyak RM1,419.00

[12] Although the judgment did not indicate if the defendants were liable jointly and severally, it is crucial to bear in mind that the judgment was predicated on the letter of guarantee. As such, the issue that had to be addressed was what terms and conditions were encapsulated in the letter of guarantee. In fact, the significance of the terms of the contract, which the loan was based upon, was highlighted in *Sumathy a/p Subramaniam v Subramaniam a/l Gunasegaran and another appeal*, indicating that the Court of Appeal would have decided otherwise if the loan agreement in that case had indicated that liability was joint and several:

> In any event, there are *no express terms in the loan agreement* indicating that the parties have agreed that the liability of the borrower and the guarantor is joint and several. *It would therefore be contrary to the contractual arrangements* reached between the parties *if this court were to read that the liability of the appellants is joint and several*. (Emphasis added.)

Whether the judgment debtor was bound by the letter of guarantee

[13] Clauses 1 and 28 of the letter of guarantee state:

> In consideration of your having opened, opening or continuing an account with and having made making or to make advances loans or otherwise having given credit or accommodation or granting to TAT HOCK INDUSTRIAL SDN BHD (376913-T) a company incorporated in Malaysia with its registered office of at Suite 1205A, 12th Floor, Johor Tower 15, Jalan Gereja, 80100 Johor Bahru ('hereinafter called Customer') at my/our request or as long as you may at your sole discretion deem I/We CHUA KOK IT (NRIC NO S0241692A), LAI YOOK FONG (NRIC NO S1781631D), CHUA WEE HUA (CAI WEIHUA) (NRIC S7719475D), SOON TIN TIN (NRIC NO 00901–01–5388) and SUPERMANIAM A/L

SELITAN (NRIC NO 690614–0105319/A1515555) the undersigned *hereby jointly and severally agree with and guarantee* you as follows, that is to say:

1. I/ We will pay on demand

(i) All moneys which now are or may during the operation of this Guarantee be owing to you from the Customer or remain unpaid on the general balance of the Customer's account with you anywhere and on any account what so over whether from the Customer alone or from the Customer jointly with or as surety for any other person.

...

28. 1(a) In the event that I/we am/are residence(s) of Malaysia, I/we shall unless otherwise instructed by you in writing, pay to you all monies and satisfy all liabilities hereunder in Ringgit Malaysia.

(b) If pursuant to Clause 28.1(a) hereof ... or pursuant to a judgment or order being made or registered against the Customer ... I/we shall as a separate and independent obligation, *jointly and severally indemnify* and hold harmless you against the amount of such shortfall ... (Emphasis added.)

[14] Since the judgment was predicated upon the letter of guarantee, the cases that are applicable to the facts of the present case are *Alliance Bank Malaysia Bhd (formerly known as Multi Purpose Bank Bhd and Malaysia French Bank Bhd) v Mukhriz bin Mahathir & Anor* [2006] 4 MLJ 451; [2006] 2 CLJ 723 and *In Re Abu Bakar Ismail; ex parte Alliance Investment Bank Berhad* [2011] 1 LNS 1688, in which it was stated in the former case by Ramly Ali J (as he then was):

The words 'jointly and severally' is defined as 'persons who are jointly and severally bound render themselves liable not only to a joint action against them, but also to a separate actions against them individually' (see *A Dictionary of Law* LB Curzon when the letters of guarantee provide for 'joint and several' liability what they meant is that the plaintiff has a cause of action against both the defendants as guarantors not only to a joint action against them but also to separate action against them individually. In such situation, the plaintiff can proceed with one action against both of them at the same time or two separate actions against both of them individually.

[15] In interpreting the words 'jointly and severally' in the letter of guarantee, I drew guidance from *In Re Abu Bakar Ismail; ex parte Alliance Investment Bank Berhad* [2011] 1 LNS 1688, where it was stated by Lee Swee Seng JC (now JCA):

The stress in the word 'jointly' simply means that the JDs are jointly as in collectively liable for the whole judgment sum. Irrespective of their contribution to the judgment sum, finally the sum claimed cannot exceed the judgment sum. It cannot be made susceptible to the single meaning that each of the four JDs is liable only for 1/4 of his share of the judgment sum. It simply means that together and

collectively all the four JDs are liable for an amount not exceeding the judgment sum. It does not yield to the meaning of equitable or equal division or distribution of the liability. If it were so then it should be clearly stated that each defendant shall pay his equal portion of the judgment debt as in the judgment sum divided equally by the four JDs.

Likewise the stress on 'severally' simply means that each one of the four JDs may be made liable for the whole of the judgment sum. The JC may proceed against any one of the four JDs alone and that JD would have no right to complain. The stress is on the fact that singly or severally each can be made solely and sorely liable be it ever so severely for the full judgment sum. Little wonder that the expression 'jointly and severally' is used together to bring in the full meaning of 'collectively and individually' being liable for the debt. Thus when the words 'jointly' and 'severally' are combined together they produce so powerfully and potently the meaning as found in *Black Law Dictionary* (7th Ed) when in defining joint and several liability as was quoted in *Lembaga Kumpulan Wang Simpanan Pekerja v Suasa Kristal (M) Bhd & Ors* [2009] 8 CLJ 236 at p 241, it states as follows:

> A liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from non-paying parties.

[16] It is trite law that parties are bound by the terms of the agreement that they had entered into, as stated in a plethora of authorities including the Federal Court case of *Michael C Solle v United Malayan Banking Corporation* [1986] 1 MLJ 45; [1984] 1 CLJ Rep 267, where it was elucidated by Hashim Yeop Sani FJ, in the following passage:

> The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. *The intention of the parties are to be gathered from the language used. They are presumed to have intended what they said*. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement. (Emphasis added.)

[17] In fact, it is a fundamental rule in the law of contract that it is not for the court to redraft a contract which is entered freely between two contracting parties, or to read into a contract conditions that have not been inserted by the parties, or to omit terms which have been agreed to. This reminder was administered by Idrus Harun JCA in *OCBC Bank (Malaysia) Bhd v Lim Hock Kok & Anor (kedua-dua berniaga sebagai rakan kongsi di dalam firma 'Ictinus Home and Building Constructions and Designs')* [2017] MLJU 798; [2017] 9 CLJ 454, in the following passage:

> If the court were to adopt that stance, contractual rights would be rendered illusory and it will have serious and far-reaching commercial consequences. The judicial authorities referred to above clearly show that it is imperative that contractual rights

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are recognised and enforced. *It is not for the courts to rewrite a contract or bargain made by the parties*. For there to be commercial efficacy and certainty, contractual terms agreed to by the parties should be enforced. Otherwise, it would result in chaos and commercial activities would grind to a halt if parties are not entitled to determine for themselves the rights and obligations to be given or assumed under a contract.

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We should emphasise that this is a logical and acceptable construction which parties ought to bring to bear upon a contract which they have agreed to enter into upon which terms they agree to be bound. (Emphasis added.)

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[18] The judgment debtor had further submitted that he was not aware that he had signed a letter of guarantee. However, it was my view that if the judgement debtor's grievance was against the judgment that was ordered against him, the proper redress would have been for him to apply to set aside the judgment, and not to resist the bankruptcy proceedings at this stage, in light of the fact that such proceedings were properly taken out against him. It has been stated in a plethora of authorities that it is not open to the judge in exercising his jurisdiction in bankruptcy proceedings 'to strike out the creditor's petition by disputing the validity of orders made in earlier execution proceedings when the orders had not been set aside particularly so when the respondent had not at any time taken steps to have it set aside': per Lee Hun Hoe CJ (Borneo) in *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304; [1988] 1 CLJ Rep 277.

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[19] Reference on this point was made also to *Re Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (Administratrix of the estate of Mohamad Shariff bin Haji Hussain)* [2000] 6 MLJ 155; [2000] 1 LNS 197, and *Malayan Banking Bhd v Datuk Lim Kheng Khim* [1992] 2 MLJ 540; [1992] 2 CLJ Rep 826, where it was stated in the former case by Steve Shim J (as he then was) in the following passage:

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It should be noted that the issuance of a BN has to be founded upon a final judgment or a final order. This is reflected in s 3(1)(i) of the Bankruptcy Act 1967, in particular the proviso therein. In the instant case, the consent order stipulates payment by the JD of a quantified sum of RM33,000 in instalments providing for payment of interest in the event of default. Clearly, it finally disposes the rights of the JC and the liability of the JD. It is therefore in the nature of a final order (see *Haron bin Mohd Zaid v Central Securities (Holdings) Bhd* [1982] 2 MLJ 94; [1982] CLJ Rep 26; [1982] CLJ 293). It is also significant to note that the consent order has not been set aside *nor has the JD taken any step to challenge it. It is trite law that an order, even if irregular, is valid and enforceable until set aside. This principle is particularly relevant in bankruptcy proceedings where the court generally will not look behind the judgments or order save in very limited circumstances of fraud or illegality, etc*. (Emphasis added.)

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[20] Since the judgment was never set aside and neither was there evidence of fraud, illegality or coercion, the argument that the judgment debtor was unaware of what he had signed is untenable.

CONCLUSION

[21] In the upshot, based on the aforesaid reasons, and after judicious consideration of all the evidence before this court, both oral and documentary, including submissions of both parties, I allowed this appeal with costs.

Appeal allowed with costs.

Reported by Mohd Kamarul Anwar